

**Comments on questions posed by the Compliance Committee to the Government of Belarus
Communication ACCC/C/2009/37**

**Submitted by the communicant
September 30, 2009**

Introduction

1. This document represents comments by the communicant of the communication ACCC/C/2009/37 on some of the questions posed by the Compliance Committee to the Government of Belarus in its letter of May 1, 2009.
2. This document does not represent a reply to any response possibly given by the Government of Belarus to the questions concerned since the communicant was not aware of any response by the Government of Belarus at the time present comments were developed and submitted by the communicant.

Scope of Comments

3. The comments below are based on the analysis of the two procedures which apply to project concerned by the communication (hydro power plant): *state environmental expertiza* and *OVOS* (environmental impact assessment). As explained in the communication, the latter is not a permitting process in the meaning of Article 6 of the Convention. *OVOS* is a process of developing project documentation by the developer (with some initial approval of a technical tasks by the environmental authority). Later on this documentation is submitted for a state environmental review (*state environmental expertiza*). The *state environmental expertiza* process has indeed a permitting nature. However, *OVOS* procedures necessarily precede state-run *environmental expertiza* and include detailed requirements on public participation.
4. The key legislation on *environmental expertiza* includes:
 - *The Law of the Republic of Belarus on State Environmental Expertiza* of June 18, 1993 (as amended on July 14, 2000)
 - *Instructions on the Procedures for State Environmental Expertiza*, adopted by the Decision of the Ministry of the Environmental Protection of Belarus No.8, May 11, 2001.
5. The key legislation on *OVOS* includes:

- *Instructions on the Procedures for Environmental Impact Assessment of the Planned Economic and Other Activities in the Republic of Belarus and the List of Types and Objects of Economic and Other Activities Which Are Subject to Compulsory EIA*, adopted by the Decision of the Ministry of the Environmental Protection of Belarus No.30, June 17, 2005.

6. The *Law on Environmental Protection* (of Nov 26, 1992 as subsequently amended) is an overarching national law on environmental protection issues. For the purpose of these comments it is especially relevant on the issues of access to environmental information.

Comments on Question 2 (a)

7. The Compliance Committee asked to provide details concerning the procedures in question,¹ in particular about the detailed requirements for informing the public, as required under Article 6(2), about the initiation of the procedure and the possibilities for the public to participate, including:

- i. The requirements concerning the form of the public notice;
- ii. The requirements concerning the content of the public notice (compared to requirements under Article 6(2) a) to d);
- iii. How, in case of projects having transboundary impact, the public concerned abroad is notified.

8. Under Art.12 of the *Law on State Environmental Expertiza* directly states that if the citizens or their associations are willing to participate in the *OVOS* process, the developer bears the responsibility to provide them with relevant information and ensure their participation during development of the environmental impact assessment (*OVOS*) documents. The law puts no direct requirement on public authorities to take into account comments by the public received by the developer in the course of developers' steps to ensure public participation.

9. *Instructions on the Procedures for State Environmental Expertiza* do not provide for any requirements on public participation additional to those imposed by the *Law on State Environmental Expertiza*.

10. Detailed obligations of the developer related to public participation are set out by the *Instructions on the Procedures for Environmental Impact Assessment of the Planned Economic and Other Activities in the Republic of Belarus and the List of Types and Objects of Economic and Other Activities Which Are Subject to Compulsory EIA* (hereinafter *OVOS Instructions*)

11. Under paragraph 26 of the *OVOS Instructions* *OVOS* process comprises five stages, which – in short – are: 1) preparation of statement of intentions and approval of technical terms of reference; 2) scoping stage; 3) preparation of the environmental impact statement (EIS); 4) holding public hearings; 5) preparation of *OVOS* report. The *OVOS* report is the final stage and, together with other documents, is submitted for the state environmental expertiza.

12. Under paragraph 44 of the *OVOS Instructions* the procedure of holding public hearings includes four stages: public notice about hearings; examination by the public of the environmental impact statement and other documents; discussion of environmental impact statement and other materials (hearings themselves); preparation of records from public hearings with list of comments received and grounds for their dismissal or approval.

¹ Decision-making procedures subject to Article 6 of the Convention which, according to Belarus legislation, apply in case of authorizing a hydro power plant.

13. Paragraph 45 of the *OVOS Instructions* does not require any specific form of communicating the public notice. It only states that the public notice **may** be communicated through: publishing environmental impact statement (or its short version) in the mass-media; publication and dissemination of special information materials; direct informing via mail, e-mail or other electronic means. The developer is obliged to publish public notice in national mass-media in the case if there's a need for holding public hearings on national level (para. 49 of the *OVOS Instructions*).

14. The public notice should contain information about duration, date and location of public hearings, as well as information where the public can examine EIS and other documents (para.48 of the *OVOS Instructions*). These are the only explicit requirements for the content of the public notice which are far from meeting requirements under Article 6(2) a) to d).

15. There's no direct requirement to publish EIS. The *OVOS Instructions* vaguely lists as one of the general obligations of the developer an obligation "to organize publication of the environmental impact statement" (para.20.6 of the *OVOS Instructions*). There's no other provision requiring such a publication. This understanding is supported by three considerations: first, as discussed above, the *OVOS Instructions* list publication of EIS as only one of the possible means for distributing public notice (para.49); second, the Section 5 "Preparation of the Environmental Impact Statement" of the *OVOS Instructions* (paragraphs 38-40) sets all requirements related to EIS without indicating the obligation to publish it; third, paragraph 40 of the *OVOS Instructions* clearly states that "for the purpose of its [EIS] publication in mass-media the EIS may be prepared in short version".

Comments on Question 2 (c)

16. The Compliance Committee asked to provide details concerning the measures in the legislation to ensure that the competent public authorities give the public concerned access to any information relevant to the decision-making related to the decision-making process.

17. As explained above, the EIA legislation in Belarus (*OVOS* and environmental expertiza) puts no obligations on the public authorities to consult the public. It is only the developer who is supposed to organize public consultations. Therefore, national legislation contains no measures to ensure that public authorities provide any information relevant to decision-making procedures subject to Article 6 of the Convention.

18. The developer is obliged to provide access to the Environmental Impact Statement. The detailed requirements for which are set by the Section 5 "Preparation of the Environmental Impact Statement" of the *OVOS Instructions* (paragraphs 38-40). Those requirements hardly meet requirements set by Article 6(6) of the Convention. In particular, para.40 states that the EIS "may include special non-technical resume outlining key conclusions about impact foreseen".

19. Public hearings are organized to hold discussions on the basis of EIS and other *OVOS* documents. However, there's no direct requirement to put under discussion *OVOS* (EIA) of the project as prepared.

Comments on Question 2 (d)

20. The Compliance Committee asked to provide details concerning what particular means are available to the public to submit comments under Article 6(7).

21. The *Law on State Environmental Expertiza* does not oblige the public authorities to consider any comments from the public.

22. The *OVOS Instructions* provide for no other means of submitting the comments except during the public hearings. The developer bears no obligations in addition to obligation to consider the comments received during the public hearings.

Comments on Question 2 (e)

23. The Compliance Committee asked to provide details concerning how the final decision is notified to the public.

24. As argued, in Belarus it is only *state environmental expertiza* process which means a decision-making procedure for the purpose of Article 6 of the Convention. Therefore, the conclusions of the state environmental expertiza shall be considered as the final decision in the chain of procedures since they have a binding nature (Art.14 of the *The Law on State Environmental Expertiza* and Art.34 of the *Law on Environmental Protection*).

25. The *Law on State Environmental Expertiza* provides for no requirement to inform anyone else except for the developer about the conclusions of the state environmental expertiza.

26. As argued, the OVOS process does not have a permitting nature. Any outcomes of the that process cannot be qualified as final decision since OVOS process ends with preparation of the OVOS (EIA) report by the developer. OVOS report should include the records of the public hearings as a separate annex.

Comments on Question 2 (e)

27. The Compliance Committee asked to explain, in particular, whether conclusions of the state environmental expertiza can be exempt from disclosure (fully or in part).

28. The *Law on Environmental Expertiza* is silent on this issue.

29. The *Law on Environmental Protection* does not provide for any specific reference as to access to the conclusions of the state environmental expertiza. However, the *Law on Environmental Protection* sets basic rules on access to environmental information, including the definition of environmental information, grounds for exemptions, etc. (articles 70-74⁷). It does not differentiate between access to environmental information in general and access to information relevant to decision-making process (including decisions falling under scope of Article 6).

30. Article 74 of the *Law on Environmental Protection* provides that environmental information includes information about decisions of public authorities, on economic activities by firms and individuals which may affect the environment, including feasibility studies (first recital, paragraph 3). Environmental information is formed as a result of, in particular, carrying out environmental expertiza and OVOS (second recital, paragraphs 6 and 7). Therefore, conclusions of environmental expertiza can be considered to fall within the scope of environmental information in accordance with the art.74 of the *Law on Environmental Protection*. However, the law does not explicitly states so.

31. Article 74² lists grounds for limiting access to environmental information, including grounds for refusal to provide it. In particular, it lists as a first ground for refusal the following: "if the information is classified as state secret under national legislation on state secrets" (first recital, paragraph one) . National legislation on state secrets is based on the *Constitution of the Republic of Belarus* and includes the *Law on State Secrets* of Nov 29, 1994. Article 14 of the *Law on State Secrets* provides that information "about state of the environment" cannot be classified as state secret. Other grounds for refusal to provide environmental information under Article 74² include: if

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disclosure will harm judicial process, preliminary investigations, administrative process; in other cases if so provided by national laws, international treaties of Belarus in order to protect national security, citizens rights and freedoms, rights of legal persons. In addition, the request for information can be rejected if it relates to internal documentary of the holder of the information.

32. In our opinion, some of the grounds listed above can be used to justify refusal to provide conclusions of environmental information. This is also supported by the fact that conclusions of environmental expertiza are not listed as (and cannot realistically fall under) types of information to which access cannot be restricted under Article 74² (recital 3 of the Article Article 74²).

33. **In addition** to the question raised by the Committee, we want to bring its attention to the fact that the *OVOS Instructions* clearly state (paragraphs 20.4 and 60) that public hearings (consultations) are not held "for proposed activities which contain information classified as state secret as well as other information of limited distribution".